Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

BRUCE WILLINGHAM and TOM GRAY,
Petitioners,

vs.

SAC AND FOX NATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

Does the United States Supreme Court's doctrine of tribal protections/sovereignty render a federally recognized Indian tribe immune from suit in state court on claims arising out of the tribe's engagement in off-reservation commercial activities with non-members?

LIST OF PARTIES

Petitioners:

Bruce Willingham and Tom Gray, Defendants

Respondents:

Sac And Fox Nation, Plaintiff,

Additional Defendants in the District Court:

The Honorable Orvan J. Hanson, Jr., Associate District Judge, Ottawa County, Oklahoma, The District Court for the Thirteenth Judicial District, Ottawa County, Oklahoma, Ronald Fixico, Merle Boyd, Jack Thorpe, and James Branum.

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No.

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vs.

SAC AND FOX NATION,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bruce Willingham and Tom Gray, Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on February 14, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is in *Appendix A*, *infra*, page 1a. The final judgment of the United States District Court for the Northern District of Oklahoma is in *Appendix B*, *infra*, page 10a. The initial judgment of the United States District Court for the Northern District of Oklahoma is in *Appendix C*, *infra*, page 15a.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A. *infra*, page 1a) was entered on February 14, 1995. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 2101(c).

QUESTION PRESENTED

Does the United States Supreme Court's doctrine of tribal protections/sovereignty render a federally recognized Indian tribe immune from suit in state court on claims arising out of the tribe's engagement in off-reservation commercial activities with non-members?

STATEMENT OF CASE

The facts of this case are undisputed. The Sac & Fox Nation (also known as The Sac & Fox Tribe of Indians of Oklahoma, and herein the "Tribe"), is a federally recognized Indian tribe located in the State of Oklahoma, created pursuant to the Oklahoma Indian Welfare Act of 1936, 25

U.S.C. §§ 501, *et seq.* In 1983 the Tribe created the Sac & Fox Industrial Development Commission (also known as Sac & Fox Industries, Ltd., and herein the "Commission"), under authority of the Tribe's 1937 Constitution. Petitioners are citizens and residents of Oklahoma and for a period of time were the volunteer, non-tribal-members[1] of the 5-member board of directors of the Commission appointed by the Tribe. When the United States Army awarded the Commission a large defense contract in March, 1989, the Commission established at least three off-reservation manufacturing plants, including one in Commerce, Oklahoma, and ultimately employed some 500 persons, including both Indians and non-Indians, some of whom may have been members of the Tribe. In late 1990, after the Commission defaulted on the defense contract, the Tribe took over and later shut down the Commission's operations, including those at the Commerce plant, took possession of the Commission's books and records, and disregarded the employees and creditors of the Commerce plant.

In December, 1990, 98 former employees of the Commerce plant filed suit against the Commission in Oklahoma state court seeking back pay. After the Commission un-successfully moved to dismiss the action claiming immunity from suit, the state court entered a default judgment in favor of the employees,[2] which the Commission unsuccessfully appealed. Pending that appeal, the same former employees filed suit against past and present members

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[1] While Petitioner Willingham may have taken the required oath of office, it was not administered to Petitioner Gray.

[2] The 1983 tribal ordinance establishing the Commission contained provisions expressly waiving any immunity from suit in both tribal and non-tribal courts. This waiver was later temporarily revoked by the Tribe on January 14, 1991, in apparent response to the continuation of the December, 1990, employees' action.

of the Commission's board of directors, including the Petitioners, asserting violations and individual liability under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* In turn, the Petitioners filed separate third-party actions seeking indemnification from the both the Commission and the Tribe; Petitioner Willingham's action also sought recovery from the Tribe of monies loaned by him for use to pay certain delinquent federal employment taxes owed by the Commission. Petitioner Gray was awarded a default judgment in his third-party action against the Commission.

The Tribe unsuccessfully moved on separate occasions to dismiss the Petitioners' third-party actions, claiming sovereign immunity from suit. Subsequent to the entry of a scheduling order and Petitioner Willingham commencing discovery in the state court proceedings, the Tribe filed this action in the United States District Court for the Northern District of Oklahoma. The Tribe asked the District Court to enjoin the state court proceedings on the ground that the doctrine of tribal sovereign immunity protected it from suit.[3] After denying the Petitioners' separate motions to dismiss, the District Court requested an evidentiary showing from the Tribe in support of its proposition that the Commerce plant was in Indian country (i.e., within the exterior boundaries of the Quawpaw Indian Reservation) and hence the Tribe was entitled to a double-barreled claim of tribal immunity. The Petitioners produced evidence directly refuting the Tribe's claim as to the character of the Commerce plant lands (the Tribe produced none), both sides filed motions for summary judgment. and the District Court entered an order stating that

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[3] Concurrently, federal bankruptcy relief was improperly sought for the Commission in the United States Bankruptcy Court for the Western District of Oklahoma. The action was later dismissed.

the Tribe "is not entitled to assert sovereign immunity in the Ottawa County, State of Oklahoma action because the subject matter and alleged chose in action arises from the (Tribe's) engaging in 'external affairs' "[4] and entered judgment in favor of the Petitioners. The Tribe then filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), following which the District Court reversed its previous ruling and entered a permanent injunction prohibiting the Oklahoma state court from holding proceedings involving the Tribe (and "its officers and agents in their official capacities"[5]), reasoning that sovereign immunity must be explicitly waived and that the Tribe had not waived its immunity.

The Petitioners appealed the District Court ruling to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Court of Appeals affirmed the ruling of the District Court.

The underlying claim of the Petitioners rests on the fact that while the Tribe may have been insulated from claims arising out of the Commission's general operations, in taking over and later shutting down the Commission's Commerce plant operations, the Tribe forfeited any such insulation through engaging in external affairs, i.e., off-reservation commercial activities with non-members (i.e., the Commerce plant employees) which directly gave rise to the Petitioners' third-party actions in state court.

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[4] See *Appendix C*, page 22a

[5] See *Appendix B*, page 12a.

REASONS FOR GRANTING WRIT

Certiorari Should be Granted to Clarify a Doctrine Established By This Court

A. The Parties.

This case concerns the authority of a federally recognized Indian tribe to invoke this Court's doctrine of tribal protections/sovereignty to the effect of being immune from suit in a state court on claims arising out of the tribe's engagement in external affairs, i.e., off-reservation commercial activities with non-members. This case involves two former volunteer, non-tribal-member-directors of an Indian tribal entity created under authority of the Tribe's constitution which engaged in extensive and unsuccessful off-reservation commercial manufacturing enterprise activities employing hundreds of persons and who seek indemnification against Fair Labor Standards Act claims resulting from the Tribe, which assumed control of and later terminated the enterprise activities, disregarding the accrued wage claims of certain of the enterprise's employees. This is not a case involving treaties, on-reservation activities, a controversy among tribal members, the lack of a substantive right of recovery, a failure to join an indispensable party, any Indian Civil Rights Act-based claim, a due process or breach of trust claim, a controversy initiated in a tribal court, nor the Indian Reorganization Act of 1934. 25 U.S.C. §§ 476, *et seq.*

This case presents an important question of federal law, i.e., the interpretation and application of this Court's doctrine of tribal protections/sovereignty, a question which the United States Court of Appeals for the Tenth Circuit believes has not yet been resolved by this Court.[6]

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[6] "[Petitioners'] argument raises an issue that some Supreme Court

B. The United States Supreme Court Decisions.

This is a case in which the United States Court of Appeals for the Tenth Circuit abandoned what the Petitioners assert is clear historical and legal precedent, in favor of an unquestioning acceptance of the so-called *Santa Clara* Declarations.[7] Not only did the Court of Appeals wholly disregard the underlying purposes and genuinely fundamental interests behind this Court's doctrine of tribal protections/sovereignty, but also this case's abundance of extra-tribal-protections/sovereignty factors, i.e., off-reservation commercial activities involving non-members.

The Court of Appeals' decision rests in politics and philanthropy, not in hindsight, foresight or in the law. Without questioning either their accuracy or limitations, and guided by an authority "hitherto unknown, unacknowledged", "pre-existent, and paramount over the supreme law of the

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justices have discussed in various opinions but which the Court has not yet resolved." Tenth Circuit Opinion, *Appendix A*, page 7a.

[7] The so-called *Santa Clara* Declarations: "**Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers**. *Turner v United States*, 248 US 354, 358, 63 L Ed 291, 39 S Ct 109 (1919); *United States v United States Fidelity & Guaranty Co.*, 309 US 506, 512-513, 84 L Ed 894, 60 S Ct 653 (1940); *Puyallup Tribe v Washington Dept. of Game*, 433 US 165, 172-173, 53 L. Ed. 2d 667, 97 S Ct 2616 (1977). . . **But 'without congressional authorization,' the 'Indian Nations are exempt from suit.'** *United States v United States Fidelity & Guaranty Co., supra*, at 512, 84 L Ed 894, 60 S Ct 653." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L.Ed.2d 106, 115, 98 S. Ct. 1670, 1677(1978). (Emphasis supplied.)

land".[8] the Court of Appeals, in a case of first impression and profound importance, tersely declared the *Santa Clara* Declarations omnipotent and omniscient and a resulting *per se* tribal immunity against suit.

The Petitioners submit that the *Santa Clara* Declarations are strikingly inaccurate,[9] and that the Court of

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[8] See *Cherokee Nation v. Georgia*, 5 Peters 1, 50, 8 L.Ed. 25, 43 (1831), Justice Baldwin concurring.

[9] See *footnote no.* 1: In *Turner v. United States*, *supra*, the decision addressed whether a damage claim could be asserted in August, 1908, against the Creek Nation, which had been dissolved on March 4, 1906, in circumstances wherein "the fundamental obstacle to recovery (was) not the immunity of a sovereign, but the lack of a substantive right to recover the damages" and this Court ruled: "The tribal government has been dissolved. Without authorization from Congress. the Nation could not then have been sued in any court; at least, without its consent. . . ." (248 U.S., at 358. 63 L.Ed., at 294, 39 S.Ct., at 110). In *United States Fidelity & Guaranty*, *supra*, the decision addressed the question of whether the United States, which brought an action to collect on a surety bond (given with respect to coal leases of Indian lands) on its own behalf and on behalf of two dissolved Indian tribes, was bound by an unconsented-to cross-claim adjudicated against it in a separate Missouri court corporate reorganization proceeding in which the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations had filed a claim on behalf of those Indian Nations and had sought no review of the adjudication, and this Court ruled: "No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States." (309 U.S., at 512, 84 L.Ed., at 898). In *Puyallup*, *supra*, the decision addressed the question of whether an Indian tribe, by reason of having appeared in a representative capacity on behalf of individual tribal members to contest the enjoining of those members from certain off-reservation fishing activities, thereby subjected itself to the court's jurisdiction, and this Court ruled: "Thus Puyallup I settled an important threshold question in this case - regardless of tribal sovereign immunity, individual defendant-members of the Puyallup Tribe remain amenable to the process of the Washington courts in connection with fishing activities occurring off their reservation. . . * * * Absent an effective waiver or consent. it is settled that a state court may not exercise jurisdiction over a

Appeals' decision is contrary to this Court's rulings in the Georgia cases,[10] which established the doctrine of tribal protections/sovereignty and its operative principles, principles from which this Court has never strayed.

The Petitioners submit that this Court established the doctrine of Indian tribal sovereignty to temporarily accord Indian tribes certain protections against interference in self-governance and territorial occupancy and control so as to facilitate their assimilation into the dominant society. That the enforcement of the tribal protections has often occurred in litigious circumstances has had the unfortunate effect of confusing the characterization of the doctrine as one of tribal immunity against suit,[11] versus what it is, *a doctrine of*

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recognized Indian tribe. . . Respondent does not argue that either the Tribe or Congress has waived its claim of immunity or consented to the entry of an order against it. And certainly, the mere fact that the Tribe has appeared on behalf of its individual members does not effect a waiver of sovereign immunity for the Tribe itself." (433 U.S., at 171-173, 53 L.Ed.2d, at 673-674, 97 S.Ct., at 2620-2621). The Petitioners submit that not one of these decisions supports Justice Thurgood Marshall's "long been recognized" declaration in *Santa Clara, supra,* and that the exclusivity of Justice Marshall's "without congressional authorization" declaration is clearly erroneous.

[10] *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810); *Johnson v. M'Intosh*, 8 Wheaton 543, 5 L.Ed. 681 (1823); *Cherokee Nation v. Georgia, supra;* and *Worcester v. Georgia*, 6 Peters 515, 8 L.Ed. 483 (1832).

[11] See *Santa Clara Pueblo v. Martinez, supra,* 436 U.S., at 58, 56 L.Ed.2d, at 115, 98 S.Ct., at 1677, "immunity from suit;" *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 115 L.Ed.2d 686, 696, 111 S.Ct. 2578, 2583 (1991), "immunity against suit;" and *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 508, 112 L.Ed.2d 1112, 1119, 111 S. Ct. 905, 908 (1991), "immunity from suit." See similar characterizations as "immunity from state taxation" and "tax immunity," e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, Justice Rehnquist's separate

limited protections for Indian tribes, entities which in 1831 were characterized by Justice Johnson as "an anomaly unknown to the books that treat the States."[12]

Exactly how the dependent status and pre-emption analyses, and their application, fit into the consideration of the question presented herein, or whether they should, is unclear. The pre-emption analysis appears to have no application, unless the Court should choose to find Indian tribes and the Tribe subject to the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, and thereupon potentially directly responsible to the state court claimants against which Petitioners seek indemnity. Under Petitioners' submissions, the dependent status analysis appears to be inappropriate because, historically and under the Georgia cases, Indian tribes were never recognized as having sovereignty, but rather as having only some of the attributes of sovereignty, and thus in question is not what "sovereign rights" have been taken away from the tribes, or of what "sovereign rights" they have been divested, but rather what protections (or attributes of sovereignty) were accorded to the tribes in the first instance.[13]

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opinion, 447 U.S. 134, 176, 65 L.Ed.2d 10, 44, 100 S.Ct. 2069, 2093; reh. den. 448 U.S. 911, 65 L.Ed.2d 1172, 101 S.Ct. 25 (1980); *Mescalero Apache Tribe v. Jones*, footnotes 9, 10 and 13, 411 U.S. 145, 152-154 and 157, 36 L.Ed.2d 115, 121-122 and 124, 93 S.Ct. 1267, 1272-73 and 1275 (1973) ; *Moe v. Salish & Kootenai Tribes, supra*, 425 U.S. 463, 479, 48 L.Ed.2d 96, 110, 96 S.Ct. 1634, 1644 (1976); and *Sac and Fox Nation v. Oklahoma Tax Commission*, footnote 3, 967 F.2d 1425, 1428 (10th Cir. 1992); vacated by *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. __, 124 L.Ed.2d 30, 113 S.Ct. 1985 (1993).

[12] *Cherokee Nation v. Georgia, supra*, 5 Peters, at 27, 8 L.Ed., at 34, Justice Johnson concurring.

[13] ". . . (The Indian tribes) are not named or referred to in any part of the

The importance of analyzing the subject question under the principles established in the Georgia cases is three-fold: first, those principles had an historical and reasoned basis which transcended politics;[14] second, the purposes

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opinion of the court (in *Johnson v. M'Intosh, supra*) as nations or States, and nowhere declared to have any national capacity or attributes of sovereignty in their relations to the general or State governments . . . the language of the court is too explicit to be misunderstood . . . the judicial power cannot divest the States of rights of sovereignty and transfer them to the Indians by decreeing them to be a nation, or a foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have (sic) acted for fifty-five years; and force, by mere judicial power, upon the other departments of this government and the States of this Union, the recognition of the existence of nations and States within the limits of both, possessing dominion and jurisdiction paramount to the federal and State constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights of full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of the government; denied by all through all times; unclaimed till now; and now declared to have been called into exercise - not by any change in our Constitution, the laws of the Union or of the States - but pre-existent and paramount over the supreme law of the land.", *Cherokee Nation v. Georgia, supra*, 5 Peters, at 48-50, 8 L.Ed., at 42-43, Justice Baldwin concurring; and "At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. . . . " *Worcester v. Georgia, supra*, 6 Peters, at 580, 8 L.Ed., at 508, Justice M'Lean concurring.

[14] The Petitioners assert that this Court's judicial doctrine of tribal protections/sovereignty is derived from the principles announced by Chief Justice Marshall in *Johnson v. M'Intosh, supra*, i.e.: "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. *Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that*

behind the principles are clearly set forth: and third, the application of the principles is not muddied by less than careful and less than thoughtful research and articulation. Given the Georgia cases as the reference point, the distinctions made by this Court in its application - *but not necessarily in its articulation* - of its doctrine of tribal protections/sovereignty become clear and certain. Illustrative decisions by this Court are:

> (a) upholding state regulatory powers over an Indian tribe where no reservation activity, *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 (1962);
>
> (b) both upholding (off-reservation) and rejecting (on-reservation equivalent) state taxation powers over an Indian tribe, *Mescalero Apache Tribe v. Jones*, *supra*;
>
> (c) rejecting state taxation powers over reservation

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their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. When this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force with strangers.

" When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and injury to his power," and the recitations which follow. (8 Wheaton, at 589-590, 5 L.Ed., at 692-693.) (Emphasis supplied.)

member income earned on-reservation. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164. 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973);

(d) rejecting state licensing power over an Indian tribe on-reservation. *Moe v. Salish & Kootenai Tribes, supra*;

(e) rejecting tribal court jurisdiction over non-members, *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 55 L.Ed.2d 209, 98 S.Ct. 1011 (1978);

(f) rejecting federal judicial oversight in tribal membership contest, *Santa Clara Pueblo v. Martinez, supra*;

(g) upholding state jurisdiction over non-tribal-members on-reservation and over tribal members on non-trust lands, *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 58 L.Ed.2d 740, 99 S.Ct. 740; reh. den. 440 U.S. 940, 59 L.Ed.2d 500, 99 S.Ct. 1290 (1979);

(h) upholding state taxation and regulatory powers over an Indian tribe on-reservation, *Washington v. Con-federated Tribes of the Colville Indian Reservation, supra;*

(i) both upholding state licensing power over an Indian tribe off-reservation and rejecting tribal regulatory power over non-members on non-tribal lands on-reservation, *Montana v. United States*, 450 U.S. 544, 67 L.Ed.2d 493, 101 S.Ct. 1245 (1981);

(j) upholding tribal taxation power over non-members on-reservation, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 71 L.Ed.2d 21, 102 S.Ct. 894 (1982);

(k) rejecting certain state regulatory powers over an Indian tribe on-reservation, *California v. Cabazon Band of Indians*, 480 U.S. 202, 94 L.Ed.2d 244, 107 S.Ct. 1083 (1987);

(l) both upholding (off-reservation) and rejecting (on-reservation) local zoning powers over an Indian tribe, *Brendale v. Confederated Yakima Nation*, 492 U.S. 408, 106 L.Ed.2d 343, 109 S.Ct. 2994; reh. den. 492 U.S. 937, 106 L.Ed.2d 635, 110 S.Ct. 22 (1989);

(m) both upholding (sales to non-members) and rejecting (sales to members) state taxation powers over an Indian tribe on tribal lands, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, supra;* and

(n) remand to determine residential situs of tribal members re exercise of state taxation powers within Indian country, *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. ___, 124 L.Ed.2d 30, 113 S.Ct. 1985 (1993).

If the purpose of the doctrine of tribal protections/sovereignty was to grant Indian tribes *per se* protections/immunities against inter-ference then none of the above on-reservation/off-reservation distinctions would have been determinative in any of the above-cited cases, nor would any of the above-cited member/non-member distinctions.

What too many courts have failed to appreciate,[15] *particularly since the Santa Clara Declarations in 1978*, is that the doctrine of tribal protections/sovereignty was temporarily established[16] to preserve unto the Indian tribes their pre-existing rights of self-governance and internal and territorial control, until such rights were either abandoned or revoked through exercise of the plenary power of Congress. Such purposes do not pertain to a tribe's external relations, i.e., tribal relations conducted with non-members, off-reservation. And, such purposes certainly should not pertain to a tribe's commercial relations with non-members, off-reservation.

As the commercial activities and sophistication of tribes increase there will be many cases involving the doctrine of tribal protections/sovereignty. This case is but a single example, but it is the outgrowth of tribal enterprise activities involving a multi-year, $30 million contract, at least three off-reservation plant sites scattered throughout Oklahoma,

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[15] Two decisions in particular evidence this lack of appreciation: ". . . The immunity from suit with which Congress has clothed the Indian tribes . . . ." *Bruette v. Knope*, 554 F.Supp. 301, 308 (E.D. Wisc. 1983), and the District Court's final decision herein: ". . . Thus, in granting sovereign immunity to the Plaintiff, the Congress of the United States insulated it from Oklahoma state court jurisdiction . . . ." *Appendix B*, page 11a, footnote 1.

[16] *Worcester v. Georgia, supra*, 6 Peters, at 593, 8 L.Ed., at 512-513, Justice M'Lean's concurring opinion: "*The exercise of the power of self-government by the Indians within a State is undoubtedly contemplated to be temporary*. This is shown by the settled policy of the government in the extinguishment of their title, and especially by the compact with the State of Georgia. *It is a question, not of abstract right, but of public policy* . . . a sound national policy does require that the Indian tribes within our States should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities." (Emphasis supplied.) See also *Johnson v. M'Intosh, supra*, Justice Marshall's majority opinion, 8 Wheaton, at 589-590, 5 L.Ed., at 692.

hundreds of non-member employees, and untold numbers of vendors, suppliers and other contractors. It is a case in which an Indian tribe, although initially insulated, forfeited that insulation when it took over and later shut down one of those off-reservation plant sites and chose to disregard its employees and others. Simply stated, this case presents a record in which the keynotes are tribal irresponsibility and a labored attempt by the Tribe to secure exculpation.

Imperative to the orderly and responsible development of Indian enterprise activity is a clarifying and clear pronouncement from this Court on the application of its doctrine of tribal protections/sovereignty to tribal commercial activities, both on and off-reservation, with non-members. A clarification of *Santa Clara's* utility is also needed.

Certiorari should be granted to reverse the Court of Appeals' decision because it is, in the words of Washington Supreme Court Justice Rosellini's dissent in *North Sea Products, Ltd. v. Clipper Foods,* 595 P. 2d. 938, 942 (Wash. 1979), "unjust, unwise and unreasonable." "Unjust" for the reason that it accords tribal enterprises an artificial competitive advantage over all other businesses in the United States as tribal enterprises alone can claim *legal irresponsibility*[17] for their conduct, contracts and

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[17] See Justice Frankfurter in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388, 83 L.Ed. 784, 788 (1938): "The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, *legal irresponsibility* was written into the Eleventh Amendment; as to the United States, it is derived by implication. . . . For present purposes it is academic to consider whether this *exceptional freedom from legal responsibility* rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives . . . or on the metaphysical doctrine 'that there can be no legal right as against the authority that makes the law on which the right depends.' . . . But because the doctrine gives the government a privileged position, it has been appropriately confined."

indebtedness, at will, at any time and from time to time, and generally as well as specifically (i.e., only with respect to certain creditors or claimants). "Unwise" for the reasons that it promotes tribal irresponsibility and is unduly burdensome: it places all of the burdens of tribal authority disclosure: requisite tribal action; transaction situs, law, remedy and forum selection, and availability; and requisite third-party approvals[18] entirely on those non-members who would do business with an Indian tribe or tribal enterprise - whether on or off the tribal reservation. And, "unreasonable" for the reason that it is backwards. It promotes nonaccountability and irresponsibility. It also runs afoul of the principle cited by Circuit Judge Rymer in her concurring opinion in *In Re Greene*, 980 F.2d 590, 600 (9th Cir. 1992); cert. den. ___ U.S. ___, 126 L.Ed.2d 649, 114 S.Ct. 681 (1994), i.e., " . . . it is disfavored for a commercial actor to escape the legal consequences of its actions," and in the words of Washington Supreme Court Justice Rosellini in his dissent in *North Sea Products, supra*, it decrees an anomaly which "hardly accords with the concept of an orderly and equally protected society."[19] Lastly, it is unreasonable because as the Court of Appeals stated in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980); cert. den. 449 U.S. 1118, 66 L.Ed.2d 847, 101 S.Ct. 931; reh. den. 450 U.S. 960, 67 L.Ed. 2d 385, 101 S.Ct. 1421 (1981), "(t)he reason for the limitations [against suing Indian tribes] and the references to tribal immunity [in *Santa Clara*] also disappear when the issue relates to a matter outside of internal

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(Emphasis supplied.)

[18] See 25 U.S.C. § 81.

[19] 595 P.2d, at 943. It also puts Indian tribes above foreign governments: see *Republic of Argentina v. Weltover*, 504 U.S. ____, 119 L.Ed.2d 394, 112 S.Ct. 2160 (1992).

tribal affairs and when it concerns an issue with a non-Indian."

Certiorari should also be granted to reverse the Court of Appeals' decision because it is wrong. The support it has in law rests in excerpts from, *not in the substance of*, this Court's decisions. Its decisional premise is perhaps best characterized by the statement in its penultimate paragraph: "(w)hile defendants in this case were free to request a waiver of sovereign immunity before serving on the Commission's Board of Directors, they did not do so." While true, this statement, however unreasonable, evidences a political determination to protect Indian tribes against themselves and to blame others for all misfortune. While strikingly different, inasmuch as involving a state court suit by members against their tribe for wrongful death arising from on-reservation occurrences, the Alaska Supreme Court's candor in *Atkinson v. Haldane*, 569 P.2d 151, 162 (Alaska 1977), in stating that " . . . what is at issue here is essentially a political question and that this court should adhere to the principle that political questions are not justiciable," accurately characterizes how the Court of Appeals and almost every other court seems to have approached the question presented herein. In other words, there is no reason to delve into the origins, purposes and *actual applications* of the doctrine of tribal protections/sovereignty as articulated by the U.S. Supreme Court, *no one else has*; enough excerpts can be found to rationalize following the herd until Congress acts.

Lastly, certiorari should be granted because the need to re-examine, clarify and resolve the question presented herein has been spotlighted by certain past and present Justices of this Court, i.e., Justice Blackmun in his concurring opinion in *Puyallup, supra;*[20] Justice Stevens

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20 "I join the Court's opinion. I entertain doubts, however, about the

(joined by Justice Rehnquist) in the dissent in *Merrion v. Jicarilla Apache Tribe, supra*;[21] Justice Stevens (joined by Justices O'Connor and Scalia) in the dissent in *California v. Cabazon Band of Indians, supra*;[22] Justice White in his dissent from the denial of certiorari in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), cert. den. 490 U.S. 1029, 104 L.Ed.2d 202, 109 S.Ct. 1767 (1989);[23] and Justice

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continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in United States v. United States Fidelity & Guaranty Co. . . I am of the view that the doctrine may well merit re-examining in an appropriate case." 433 U.S., at 178-179, 53 L.Ed.2d, at 678, 97 S.Ct., at 2624.

21 " . . . I am convinced that the Court's treatment of these important cases gives inadequate attention to the critical difference between a tribe's powers over its own members and its powers over nonmembers. . . ." 455 U.S., at 160, 71 L.Ed.2d, at 44, 102 S.Ct., at 894.

22 ". . . Our more recent cases have made it clear, however, that commercial transactions between Indians and non-Indians - even when conducted on a reservation - do not enjoy a blanket immunity from state regulation." 480 U.S., at 223, 94 L.Ed.2d, at 263, 107 S.Ct., at 1095.

23 "*This decision conflicts with decisions of the Arizona courts applying tribal sovereign immunity to off-reservation activities* . . . An opportunity to resolve this conflict was presented by our grant of certiorari in Oklahoma Tax Comm'n v Graham, 488 US 816, 102 L Ed 2d 32, 109 S Ct 53 (1988), although we ultimately decided the case on other grounds. In that case, two questions were before us: whether the case had been properly removed to federal court and whether tribal sovereign immunity barred an action to collect taxes 'on commercial activities conducted by an Indian tribe on off-reservation lands.' We held that the case had not been properly removed. . . and as a result did not need to reach the sovereign immunity question. The present case provides an opportunity to resolve the issue we did not reach in Graham and thereby to resolve the conflict among the state courts. I would grant the petition for certiorari and resolve the question on which we previously granted certiorari but did not decide." 490 U.S., at 1029-1030, 104 L.Ed.2d, at 202-203, 109 S.Ct., at 1767-1768. (Emphasis supplied.)

Stevens in his concurring opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, supra.*[24]

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[24] "The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada v. Hall*, 440 U.S. 410, 414-416, 59 L.Ed. 2d 416, 99 S Ct 1182 (1979). In my opinion all Governments - federal, state, and tribal - should generally be accountable for their illegal conduct. The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. See *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512-513, 84 L Ed 894, 60 S Ct 653 (1940). Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory . . . or that it applies to claims for prospective equitable relief against a tribe . . . My purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity - the Tribe - is completely immune from legal process. By addressing the substance of the tax commission's claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." 498 U.S., at 515-516, 112 L.Ed.2d, at 1123-1124, 111 S.Ct., at 912-913.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari be granted.

DONE AND DATED this 12th day of May, 1995.

By _____
Samuel C. Stone
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(918) 583-1178
Counsel for Petitioner, Tom Gray

and

By _____
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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SAC AND FOX NATION, Plaintiff-Appellee, v. HONORABLE ORVAN J. HANSON, JR., Associate District Judge, Ottawa County; RONALD FIXICO; MERLE BOYD; JACK THORPE; JAMES BRANUM, Defendants, and BRUCE WILLINGHAM, TOM GRAY, Defendants-Appellants.	)	No. 93-5186

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 92-C-645-B)

G. William Rice, Rice, Withiam, Parmer & Bigler, Cushing, Oklahoma (Gregory H. Bigler, with him on the briefs) for the Plaintiff-Appellee.

Samuel C. Stone (R. Brent Blackstock, Tulsa, Oklahoma, with him on the briefs) of Stone Jessup, P.C., Tulsa, Oklahoma, for the Defendants-Appellants.

Before TACHA, * FAIRCHILD and LOGAN, Circuit Judges.

TACHA, Circuit Judge:

The Sac and Fox Nation ("the Nation"), a federally recognized tribe of Native Americans residing in Oklahoma, brought suit in district court under 28 U.S.C. § 1362. Claiming sovereign immunity, the Nation sought to enjoin an Oklahoma state court proceeding in which defendants had filed third-party suits against the Nation. Both parties filed motions for summary judgment, and the district court ruled in favor of defendants. After the Nation filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), the district court reversed its previous ruling and entered a permanent injunction prohibiting the Oklahoma state court from holding proceedings involving the Nation. Defendants now appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

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* The Honorable Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

The facts of this case are undisputed. The Nation created the Sac and Fox Industrial Development Commission ("the Commission") in 1983. Defendants were members of the Commission's five-member board of directors. When the United States Army awarded the Commission a large defense contract in 1989, the Commission established several manufacturing plants, including one in Commerce, Oklahoma. The Commerce plant's employees included persons who were not members of the Nation. In 1990, the Commission defaulted on the defense contract and the Nation shut down the Commission.

In late 1990, a number of the Commission's former employees filed suit against the Commission in state court seeking back pay. The state court entered a default judgment in favor of the employees, which the Commission appealed. These same former employees then filed suit against the Commission's board of directors, including the defendants in this case. The employees alleged violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. In turn, three of the defendants filed third-party actions seeking indemnification from the Commission and the Sac and Fox Nation.

In the midst of the state court proceedings, the Nation filed this action in federal court. The Nation asked the district court to enjoin the state court proceedings on the ground that the doctrine of sovereign immunity protected it from suit. Both sides filed motions for summary judgment. The district court entered an order stating that "the Sac and Fox Nation is not entitled to assert sovereign immunity in the Ottawa County, State of Oklahoma action because the subject matter and alleged chose in action arises from the Nation's engaging in 'external affairs.' " In accordance with that ruling, the court entered judgment in favor of defendants Tom

Gray and Bruce Willingham.

In accordance with Fed. R. Civ. P. 59(e), the Nation then filed a motion to alter or amend the judgment. The district court reversed its earlier ruling and entered judgment in favor of the Nation. The court reasoned that sovereign immunity must be explicitly waived and that the Nation had not waived its immunity in this case. Defendants appeal from this ruling.

II. THE ANTI-INJUNCTION ACT

The first potential bar that the Nation must overcome is the Anti-Injunction Act, 28 U.S.C. § 2283, which reads:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[1]

Defendants, however, did not raise the applicability of

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[1] To repeat, the Nation brought suit under 28 U.S.C. § 1362, which provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . , wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." It is possible that section 1362 authorizes federal courts to enter injunctions against state proceedings. Cf. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 472 (1976) (stating that 28 U.S.C. § 1341 did not bar an injunction against the collection of a state tax because the Court found "an indication of a congressional purpose [in section 1362] to open the federal courts to the kind of claims that could have been brought by the United States as trustee"). Because we determine that defendants did not raise the Anti-Injunction Act previously, however, we need not decide that issue here.

the Anti-Injunction Act in the district court proceedings. "As a general rule we refuse to consider arguments raised for the first time on appeal unless sovereign immunity or jurisdiction is in question." Daigle v. Shell Oil Co., 972 F.2d 1527, 1539 (10th Cir. 1992). When the issue raised for the first time on appeal is neither sovereign immunity not jurisdiction, " '[t]he failure to raise the issue with the trial court precludes review except for the most manifest error.'" Rademacher v. Colorado Ass'n of Soil Conservation Dist. Medical Benefit Plan, 11 F.3rd 1567, 1572 (10th Cir. 1993) (quoting Hicks v. Gates Rubber Co., 928 F.2d 966, 970 (10th Cir. 1991)).[2]

The Anti-Injunction Act is not a jurisdictional statute; "[i]t merely limits [the district courts'] general equity powers in respect to the granting of a particular form of equitable relief." Smith v. Apple, 264 U.S. 274, 279 (1924). Because defendant has not shown manifest error, we will not review the question here. See Airlines Reporting Corp. v. Barry, 825 F. 2d 1220, 1225 (8th Cir. 1987) ("[Appellant]'s failure to assert the [Anti-Injunction] Act in the District Court bars her from obtaining review of this issue on appeal.").

III. SOVEREIGN IMMUNITY

Having determined that the issuance of an injunction in this case is not barred by section 2283, we turn to the merits: whether the Nation was entitled to sovereign immunity in the state court case. We review de novo the legal question of when a party can assert sovereign immunity.

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[2] Rademacher also indicates that review of issues raised for the first time on appeal may be possible in "instances where public interest is implicated or where manifest injustice would result." Rademacher, 11 F.3d at 1572 (citations omitted).

Price v. United States, 7 F.3d 968, 969 (10th Cir. 1993).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).[3] Thus, suits against Indian tribes are barred "absent a clear waiver by the tribe or congressional abrogation." Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969)).

The district court found that the Nation did not explicitly waive its sovereign immunity, and defendants do not contest this finding. In addition, we find that a waiver of sovereign immunity cannot be inferred from the Nation's engagement in commercial activity. See American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378-79 (8th Cir. 1985) (holding that a Native American tribe's sovereign immunity cannot be waived by implication in contract actions); see also Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 (1st Cir. 1993) (declining to evaluate several factors to infer a tribe's waiver of sovereign immunity). Thus, if the Nation was entitled to sovereign immunity, it did not waive its immunity from suit. We must therefore address the predicate question of whether the Nation had sovereign immunity in the first instance.

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[3] Defendants ask us to abandon the principle of sovereign immunity for Indian tribes despite Martinez and a plethora of Tenth Circuit opinions. See, e.g., Ramey Constr. Co. v. Apache Tribe, 673 F.2d 315, 319 (10th Cir. 1982). We decline defendants' invitation to ignore well-established Supreme Court and Tenth Circuit precedent.

Defendants claim that the Nation is not entitled to sovereign immunity in this case because the commercial activity at issue took place outside the Nation's reservation.[4] Analogizing a Native American tribe to a foreign sovereign, defendants claim that sovereign immunity is inapplicable to a tribe's extra-territorial proprietary activity. See U.S.C. § 1605(a) (2) (a foreign sovereign is not immune from suit when it engages in commercial activity in the United States). Defendants' argument raises an issue that some Supreme Court justices have discussed in various opinions but which the Court has not yet resolved. See, e.g. Potawatomi Tribe, 498 U.S. at 515 (Stevens, J., concurring) ("I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory."); Pueblo of Acoma v. Padilla, 490 U.S. 1028, 1028 (denial of certiorari) (White, J., dissenting); cf. In re Greene, 980 F.2d 590, 598-600 (9th Cir. 1992) (Rymer, J., concurring), cert. denied, 114 S. Ct. 681 (1994).[5]

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[4] In its order granting summary judgment, the district court stated that the Nation took part in "certain off-reservation commercial activities." It appears that the Nation disputed that fact at summary judgment, however. Because this fact is immaterial to our resolution of this case, we assume arguendo that the district court's finding was correct.

[5] A number of state courts have also confronted this question. See, e.g. Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1109 (Ariz. 1989) ("[S]ubstantial policy considerations militate in favor of recognizing immunity when a tribe conducts tribal business through a tribal economic entity."); Seminole Tribe v. Houghtaling, 589 So.2d 1030, 1032 (Fla. Dist. Ct. App. 1991) (holding that a tribe was "immune from suit despite its involvement in a commercial enterprise"), aff'd, 589 So.2d 1030 (Fla. 1993); Padilla v. Pueblo of Acoma, 754 P.2d 845, 850 (N.M. 1988) ("We know of no controlling law that divests the New Mexico courts of jurisdiction over Indian tribes for off-reservation business conduct."), cert. denied, 490 U.S. 1029 (1989); North Sea Products, Ltd. v. Clipper Seafoods Co., 595 P.2d 938, 942 (Wash. 1979) (en banc) (Rossellini, J.

This Court recently decided a case presenting similar issues. In Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992), a bank brought an interpleader action against two parties, including a Native American tribe. The case centered on the proper disposition of funds related to the tribe's bingo enterprise. The bank first argued that commercial relations between Indian tribes and non-Indians would be chilled if the Indian tribe were entitled to assert sovereign immunity. Dismissing that contention, we noted that the bank's "policy argument precisely misses the point of sovereign immunity, which is the power of self-determination." Id. at 1169. Next, the bank attempted to analogize an Indian tribe's sovereign immunity to a foreign sovereign pursuing commercial activity in the United States. We rejected that argument as well, stating that "Indian tribes are not foreign sovereigns, but are 'domestic dependent nations.'" Id. (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).[6]

Bank of Oklahoma did not address the issue of whether the tribe's commercial activity took place off-reservation. Nevertheless, we do not believe that the location of the commercial activity is determinative. In In re Greene, the Ninth Circuit concluded that "sovereign immunity, as it

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concurring) (stating that, while sovereign immunity is the rule for commercial activity outside Indian territory, "the present rule is unjust, unwise and unreasonable").

[6] The Fifth Circuit has also determined that sovereign immunity applies to a Native American tribe's commercial activities. See Maryland Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517, 521 (5th Cir.) ("The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material."), cert. denied, 385 U.S. 918 (1966).

existed at common law, had an extra-territorial component." In re Greene, 980 F.2d at 596. We accept the Ninth Circuit's reading of the history of sovereign immunity doctrine and conclude that the extra-territorial nature of these transactions does not strip the Nation of its right to assert sovereign immunity.[7]

The analysis used in Bank of Oklahoma controls our decision here. While defendants in this case were free to request a waiver of sovereign immunity before serving on the Commission's Board of Directors, they did not do so. Without an explicit waiver, the Nation is immune from suit in state court -\- even if the suit results from commercial activity occurring off the Nation's reservation.

IV. CONCLUSION

Because the issue was not presented to the trial court, we decline to review whether the district court's issuance of the injunction was proper under the Anti-Injunction Act. We find no error in the district court's conclusion that the Nation was entitled to sovereign immunity in the state action. The judgment of the district court is therefore AFFIRMED.

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[7] But cf. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (stating that, in the context of state taxation, "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State").

APPENDIX B - FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 92-C-645-B**
	)	
THE HONORABLE ORVAN J. HANSON, JR., Associate District Judge, Ottawa County, Oklahoma, and THE DISTRICT COURT FOR THE THIRTEENTH JUDICIAL DISTRICT, Ottawa County, Oklahoma, RONALD FIXICO, MERLE BOYD, BRUCE WILLINGHAM, JACK THORPE, TOM GRAY and JAMES BRANUM,	)	
	)	
Defendants.	)	

ORDER

The Court has for decision the motion of the Defendants, Tom Gray and Bruce Willingham, to alter judgment and impose sanctions (docket # 37), and plaintiff's motion to alter or amend judgment (docket # 45). Said motions refer to the Court's Order and Judgment filed March 2, 1993.

Upon reconsideration and reflection, the Court concludes its Order and Judgment filed March 2, 1993, is in error. A reading of Appendix B to the Defendant Tom

Gray's brief in support of motion to dismiss and in response to plaintiff's motion for preliminary injunction (Public Law No. SF-84-05, Section 302, as amended, of the Sac and Fox Tribe of Indians of Oklahoma, also known as Sac and Fox Nation), demonstrates that the Sac and Fox Tribe did not waive tribal sovereign immunity. The Tribe waived sovereign immunity only in reference to the Sac and Fox Industrial Development Commission as stated. A waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) (citations omitted.).[1]

In order to subject the sovereign (the Plaintiff herein, Sac and Fox Nation), to suit in the state courts of Oklahoma, there must be a specific waiver of sovereign immunity and none exists herein. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, _____ U.S. ____, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 892 (10th Cir. 1989); White v. Pueblo of San Juan, 728 F.2d 1307, 1311 (10th Cir. 1984); Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992); Black Hills Institute v. Dept. of Justice, 967 F.2d 1237, fn. 5 (8th Cir. 1992); and In Re Green v. Mt. Adams Furniture, 980 F.2d 590 (9th Cir.

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[1] While the record is clear that the Sac and Fox Industries Commission is the alter ego of the Plaintiff, Sac and Fox Nation, the Plaintiff did not waive sovereign immunity to permit suits against it in the Oklahoma state court. Thus, in granting sovereign immunity to the Plaintiff, Sac and Fox Nation, the Congress of the United States insulated it from Oklahoma state court jurisdiction relative to the individual Defendants' claims against the Plaintiff herein.

1992).

The individual claimants in the pending action in the District Court of Ottawa County, State of Oklahoma, Dorothy Johnston, et al. v. Ronald Fixico, et al., Case No. C-91-131, desiring to proceed against the Plaintiff herein, Sac and Fox Nation, must first proceed in the Sac and Fox Tribal Court as such state court is without jurisdiction due to the Plaintiff's grant of sovereignty by the United States Government. Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992). Thus, Plaintiff is entitled to the entry of the preliminary injunction requested under Fed.R.Civ.P. 65. Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992), and Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). For the same reasons, Plaintiff is also entitled to the entry of a permanent injunction as requested in their complaint. Defendants' motion to alter judgment and impose sanctions should be and is hereby denied.

IT IS THEREFORE ORDERED, the Honorable Orvan J. Hanson, Jr., Associate District Judge, Ottawa County, Oklahoma, and the individual Defendants herein, are hereby restrained and enjoined from conducting proceedings, enforcing orders, or proceeding against the Sac and Fox Nation and its officers and agents in their official capacities in said state court action.

A Judgment in keeping with the Court's Order herein shall be filed contemporaneously herewith.

DATED this 29th day of July, 1993

/S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-C-645-B
	)	
THE HONORABLE ORVAN J. HANSON, JR., Associate District Judge, Ottawa County, Oklahoma, and THE DISTRICT COURT FOR THE THIRTEENTH JUDICIAL DISTRICT, Ottawa County, Oklahoma. RONALD FIXICO, MERLE BOYD, BRUCE WILLINGHAM, JACK THORPE, TOM GRAY and JAMES BRANUM,	)	FILED July 29, 1993
	)	
Defendants.	)	

JUDGMENT

In accordance with the Court's Order granting the Plaintiff's motion to alter or amend judgment, Judgment is hereby entered in favor of the Plaintiff, Sac and Fox Nation, and against the Honorable Orvan J. Hanson and the individual Defendants herein. Such Defendants are hereby permanently enjoined from conducting proceedings, enforcing orders, or proceeding against the Sac and Fox Nation and its officers and agents in their official capacities in the case of Dorothy Johnston, et al., v. Ronald Fixico, et al., No. C-91-131.

Costs are hereby assessed against the Defendant if timely applied for pursuant to Local Rule 6, and the parties

are directed to pay their own respective attorneys fees.

DATED this 29th day of July, 1993.

/S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX C - INITIAL JUDGMENT OF THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 92-C-645-B**
	)	
THE HONORABLE ORVAN J. HANSON, JR., Associate District Judge, Ottawa County, Oklahoma. and THE DISTRICT COURT FOR THE THIRTEENTH JUDICIAL DISTRICT, Ottawa County, Oklahoma, RONALD FIXICO, MERLE BOYD, BRUCE WILLINGHAM, JACK THORPE, TOM GRAY and JAMES BRANUM,	)	**FILED March 2, 1993**
	)	
Defendants.	)	

ORDER

Before the Court for decision is Plaintiff's Motion for Summary Judgment and the Motion for Summary Judgment of the Defendants, Tom Gray and Bruce Willingham. Herein, the Sac and Fox Nation ("Nation") seeks to enjoin the District Court of Ottawa County, State of Oklahoma, from entertaining state court jurisdiction over the Nation in the case of Dorothy Johnston, et al. v. Ronald Fixico, et al., Case No. C-91-131, from conducting proceedings therein, and to enjoin the individual Defendants from conducting

proceedings, enforcing orders, or proceeding against the Nation and its officers or agents in said case. The theory of Plaintiff's requested injunction is that the Nation and its officers or employees are a duly authorized Indian tribe, granted sovereign immunity by the United States, and the activity that is the subject of the state court action was being conducted on Indian Country. Following consideration of the record before the Court, and pursuant to Fed.R.Civ.P. 56, the Court concludes the Plaintiff's Motion for Summary Judgment should be OVERRULED and Plaintiff denied its requested injunction, and the Motion for Summary Judgment of said Defendants is SUSTAINED to the extent of overruling the Nation's request for injunction and for the reasons stated said District Court of Ottawa County, State of Oklahoma action is permitted to proceed against the Plaintiff, Sac and Fox Nation.

The uncontroverted facts are as follows:

1. The Sac and Fox Nation is a federally recognized tribe, band or nation of Indians residing in Oklahoma with a constitution duly approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of June 26, 1936, and duly ratified by the members of the Nation. (Complaint, ¶ 1).

2. The Defendant, The Honorable Orvan J. Hanson, Jr., is a District Court judge in the County of Ottawa, State of Oklahoma. (Complaint, ¶ 2).

3. The Defendants, Ronald Fixico, Merle Boyd, Bruce Willingham, Jack Thorpe, Tom Gray and James Branum, are citizens of the State of Oklahoma, and were at one time officers or directors of the Sac and Fox Industrial Development Commission ("Commission"). (Complaint, ¶

3).

4. During 1990, certain persons commenced litigation against the Commission in the Ottawa County District Court, in the State of Oklahoma, Case No. C-90-393, entitled Dorothy Johnston, et al., v. Sac and Fox Industries, Ltd., et al. (Complaint, ¶ 6).

5. A default judgment for money damages has been entered in Case No. C-90-393, against the Commission. (Complaint, ¶ 7).

6. Plaintiffs in Case No. C-90-393 subsequently filed another suit against certain individual officers and directors (past and/or present) of the Commission in Ottawa County District Court, in the State of Oklahoma, Case No. C-91-131, entitled Dorothy Johnson, et al. v. Ronald Fixico, et al., i.e., the state action. (Complaint, ¶¶ 8, 9).

7. After being sued individually in the state action, the Defendants, Bruce Willingham, Tom Gray and James Branum, filed third-party suits against the Nation. (Complaint, ¶ 10).

8. The Nation objected to being sued in the state action on sovereign immunity and other grounds and filed a motion to dismiss which was overruled by the state court. (Complaint, ¶¶ 12 and 13).

9. The order overruling the Nation's motion to dismiss in the state action requires the Nation to appear in the state court as a third-party defendant in said action and proceed to trial or other disposition. (Complaint, ¶ 14).

10. The principal place at which the state court

civil actions arose is 401 East Commerce Street. Commerce, Ottawa County, Oklahoma. (Paragraph 3, Affidavit page 2, Appendix A to Defendant Tom Gray's Brief in Support of Motion to Dismiss.)

11. The principal place at which the state action arose is not part of the Nation's reservation. (Complaint, ¶¶ 9, 10 and 17).

12. The site on which the Commerce, Oklahoma, plant is situated was a part of the allotment of Ada A. Newman, an Indian of the Quapaw Tribe (Ex. 1, Deft. Motion for Summary Judgment), who duly applied for and received an "Order for the Removal of Restrictions" from the United States Department of the Interior, filed of record October 22, 1909, (Ex. 2, Deft. Motion for Summary Judgment), and was thereafter and under three separate deeds dated December 27, 1909, (Ex. 3, Deft. Motion for Summary Judgment), December 20, 1910, (Ex. 4, Deft. Motion for Summary Judgment), and January 8, 1912, (Ex. 5, Deft. Motion for Summary Judgment), covering 120 acres in the aggregate, conveyed to James F. Robinson, to Moody R. Tidwell, and to J. F. Robinson, C. M. Harvey, G. L. Coleman and A. E. Coleman, respectively, which individuals later formed Commerce Mining and Royalty Company and platted said acreage into lots within 46 blocks which were sold to the general public (and which said acreage was on March 26, 1915, platted as Commerce, Oklahoma) (Ex. 6, Deft. Motion for Summary Judgment), including the predecessors in title to the Commission's Commerce, Oklahoma plant site, i.e., Commerce Industrial Development Corporation (Virginia Lee Heydt, president, and Francis E. Heydt, secretary), which obtained title (Ex. 7, Deft. Motion for Summary Judgment). and thereafter contracted the same to the Commission under date of July 19, 1989, under a

certain Purchase Agreement which also included a second plant site in Idabel, Oklahoma (Ex. 8, Deft. Motion for Summary Judgment).

13. The Nation through enactment of its Public Law No. SF-84-05, previously created the Sac and Fox Industrial Development Commission, a/k/a Sac and Fox Industries, Ltd. ("Commission"), which undertook certain off-reservation commercial activities for the manufacture and delivery of some 490,915 units of chemical protective suits under a certain defense procurement contract No. DLA 100-89-C-0378, awarded March 10, 1989, by the Defense Personnel Support Center of the Defense Logistics Agency of the United States Army, utilizing, among other locations and facilities, a plant site owned by and contracted from Commerce Industrial Development Corporation (a non-Indian owned Oklahoma corporation), at 401 East Commerce Street, Commerce, Oklahoma, and employed various persons for manufacture and production of said suits, some of which were Indian members of the Nation and some of which were non-Indian.

Subsequent thereto, 90 to 100 former employees of the Commission's Commerce, Oklahoma plant brought an action in the District Court of Ottawa County, Oklahoma, against the Commission for unpaid wages and money damages for work performed thereat as provided in uncontroverted Facts 4 and 5, above. Said former employees of Commission's Commerce, Oklahoma plant also brought another civil action in the Ottawa County, State of Oklahoma District Court referred to in paragraphs 6, 7, 8 and 9.

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment. after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Legal Analysis and Conclusion:

The principal issues presented by the uncontroverted facts herein are whether the Nation is entitled to assert sovereign immunity concerning the business activity that gave rise to the Ottawa County, Oklahoma litigation and whether the Commerce, Oklahoma plant is located in "Indian County" within the operation of federal law.

In determining the issue of sovereign immunity, the Court must distinguish between those inherent powers

retained by the tribe and those divested which involve relations between the tribe and nonmembers of the tribe and external relations. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 36 L.Ed.2d 114, 119, 93 S.Ct. 1267 (1973); Montana v. U. S., 450 U.S. 544, 564-565, 67 L.Ed.2d 493, 509-510, 101 S.Ct. 1245 (1981); and Brendale v. Confederated Yakima Nation, 492 U.S. 408, 106 L.Ed.2d 343, 101 S.Ct. 2994, *reh'g denied*, 492 U.S. 937, 106 L.Ed.2d 635, 110 S.Ct. 22 (1989). Said authority supports the conclusion that the Sac and Fox Nation is not entitled to assert sovereign immunity in the Ottawa County, State of Oklahoma, action because the subject matter and alleged chose in action arises from the Nation's engaging in "external relations."

Further, the plant site in Commerce, Oklahoma, does not come within the definition of "Indian Country." 18 U.S.C. § 1151, and Oklahoma Tax Comm. v. Potawatomi Tribe, 498 U.S. _____, 112 L.Ed.2d 1112 at 1121 (1991), quoting United States v. John, 437 U.S. 634, 648-49 (1978).

For the reasons above stated, the Motion for Summary Judgment of the Plaintiff, Sac and Fox Nation, is hereby OVERRULED, and the Motion for Summary Judgment of the Defendants, Bruce Willingham and Tom Gray, is hereby SUSTAINED. A separate Judgment in keeping with the Court's order herein shall be filed contemporaneously.

DATED this 1st day of March, 1993.

/S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 92-C-645-B**
	)	
THE HONORABLE ORVAN J. HANSON, JR., Associate District Judge, Ottawa County, Oklahoma, and THE DISTRICT COURT FOR THE THIRTEENTH JUDICIAL DISTRICT, Ottawa County, Oklahoma, RONALD FIXICO, MERLE BOYD, BRUCE WILLINGHAM, JACK THORPE, TOM GRAY and JAMES BRANUM,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the Court's Order Overruling the Plaintiff's Motion for Summary Judgment, and Sustaining the Motions for Summary Judgment of the Defendants, Bruce Willingham and Tom Gray. Judgment is hereby entered in favor of the Defendants denying the Plaintiff Sac and Fox Nation's request to enjoin the District Court of Ottawa County, State of Oklahoma, from entertaining state court jurisdiction over Plaintiff in the case of Dorothy Johnston, et al., v. Ronald Fixico, et al., No. C-91-131, and Plaintiff's action is hereby dismissed. Costs are hereby assessed against the Plaintiff if timely applied for pursuant to Local Rule 6,

and the parties are directed to pay their own respective attorneys fees.

DATED this 1st day of March, 1993.

/S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 14 1995
OFFICE OF THE CLERK

No. 94-1887

In The

Supreme Court of the United States

October Term, 1994

BRUCE WILLINGHAM AND TOM GRAY,

Petitioners,

v.

THE SAC AND FOX NATION,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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STATEMENT

The complaint filed by the Sac and Fox Nation in the Federal Court below sought to enjoin a State court action, which, in turn, was attempting to decide the right of former Sac and Fox officials, namely Commissioners of the Sac and Fox Industrial Development Commission, to indemnification under the laws of the Sac and Fox Nation. These Commissioners held office under the Nation's laws, and were responsible for carrying out their duties under Sac and Fox laws as officers of an independent agency of the Sac and Fox Nation.

Several former members of the Board of Commissioners of the Sac and Fox Industrial Development Commission were sued in state court by former employees of the Commission. Petitioners filed a third party state suit directly against the Sac and Fox Nation requesting that the Nation be found liable to them if the Petitioners were found liable to the state court Plaintiffs in the primary suit in the state court. Petitioners wholly failed to allege any basis for state court jurisdiction over the Sac and Fox Nation. The Sac and Fox Nation has never waived its immunity from this third party suit. Without such a waiver of immunity, Petitioners' suit was properly enjoined from proceeding.

SUMMARY OF ARGUMENT

This Petition for a Writ of Certiorari should be denied. A Petition for a Writ of Certiorari will only be granted when there are special and important reasons therefor. Supreme Court Rule 10. Of concern here are

two of the possible reasons for review: first, whether the court of appeals decision is in conflict with another court of appeals, or has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. Second, has the court of appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or decided a federal question in a way that conflicts with applicable decisions of this Court. None of the above factors are present in this case.

This Court and the lower circuits have squarely and repeatedly held that sovereign immunity is one of the fundamental aspects of sovereignty still retained by the tribes. While Petitioners review many Supreme Court cases that recognize the limitations upon the generic concept of Indian Tribes sovereign powers, *Petitioners' brief* pp. 12-14, they do not present a single decision that limits the tribes specific power of sovereign immunity from suit absent express tribal consent, or express Congressional authorization. The Tenth Circuit correctly recognized this doctrine.

Petitioners also argue, without explicitly stating, that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (hereinafter *Santa Clara*) should be reversed. Respondent believes that the Supreme Court should not abandon the doctrine of sovereign immunity as found in *Santa Clara*, its predecessors or progeny. Respondent also believes that barring a complete reversal of Supreme Court jurisprudence, this case does not present the proper facts to carve out an exception to sovereign immunity where external relations of an Indian tribe are involved.

Finally, the Supreme Court has previously held in matters involving Indian tribes and tribal matters, that the tribal court should be given first opportunity to determine tribal jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987). Respondent believes that the lower court correctly applied the above Supreme Court's Indian law jurisprudence to the case below.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THE SUPREME COURT HAS CLEARLY UPHELD THE SOVEREIGN IMMUNITY OF INDIAN TRIBES

Petitioners begin their argument by stating that "this is a case in which the United States Court of Appeals for the Tenth Circuit abandoned what Petitioners assert is a clear and historical legal precedent in favor of an unquestioning acceptance of the 'so called Santa Clara declarations.' " *Petitioners' brief* at p.7. Petitioners miss the very point of their own statement, that this Court has repeatedly confirmed the sovereign immunity of Indian tribes, bands, and nations, and this is the settled law. While Petitioners wish otherwise, this is not an unsettled area of the law, nor is there any dispute between the lower courts. This Court, speaking through Justice Marshall in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978), said that:

> Indian Tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia,* (6 Pet.) 515, 559 (1832); *see*

> *United States v. Mazurie*, 419 U.S. 544, 557 (1975); F. Cohen, *Handbook Of Federal Indian Law*, 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382, (1886). *See, United States v. Wheeler*, 435 U.S. 313 (1978) . . . Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 172-173 (1977).

The Tenth Circuit clearly adhered to the Supreme Court's articulation of sovereign immunity as described in *Santa Clara*. In fact, failure of the circuit court to follow the holding of *Santa Clara* could have been reason for this Court to grant a Writ and reverse because Indian tribes, including the Sac and Fox Nation, are immune from suit absent express authorization from Congress or the tribal government. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), *Santa Clara, supra.*

Sovereign immunity clearly remains the law as applied to federally recognized Indian tribes. The Tenth Circuit's decision falls squarely in line with previous decisions of the Tenth Circuit and other federal circuits including the Second, Eighth, and Ninth circuits regarding sovereign immunity. More importantly the Tenth Circuit's decision also follows the decisions of this Court

regarding sovereign immunity in general, and more particularly the doctrine as it applies to Indian Tribes. Thus, the Tenth Circuit ruled properly.

The Petitioners are simply wrong when they try to deny that Indian tribes possess common law immunity from suit traditionally enjoyed by sovereign powers. See, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, ___ U.S. ___, 111 S.Ct. 905 (1991); *Santa Clara*, 436 U.S. at 58 (1978); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-173 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919) The courts that have addressed the topic of sovereign immunity have uniformly recognized that doctrine and this principle has been uniformly followed. To alter that doctrine would be to abandon reams of court decisions not only in this Court[1], but also in the Tenth Circuit[2] and in the other circuits.[3]

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[1] *Lehman v. Nakshian*, 453 U.S. 156 (1981); *United States v. King*, 395 U.S. 1 (1969); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[2] *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

[3] *Whitefoot v. United States*, 293 F.2d 658 (Ct.Cl. 1961), cert. denied, 369 U.S. 818 (1962); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957), cert. denied, 355 U.S. 893 (1957); *Maryland Casualty Company v. National Bank* , 361 F.2d 517 (5th Cir. 1966); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Adams v. Murphy*,

No express waiver of sovereign immunity was made by the Sac and Fox Nation or by Congress. Since there was no express waiver of immunity from suit, it is clear that the Sac and Fox Nation was not subject to suit in state court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 172- 173 (1977)[4] Both the Tenth Circuit and the other federal circuits have also uniformly recognized tribal sovereign immunity. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957), *cert denied* 335 U.S. 893 (1957); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

Contrary to Petitioners' attempted rewriting of history, sovereign immunity is not merely a theory, it is the law. Even the dissents cited by the Petitioner, *Petitioners' brief* at p. 20, such as Justice Stevens, conceded that "The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 912 (1991).

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165 F. 304 (8th Cir. 1908); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Greene v. Wilson*, 331 F.2d 769 (9th Cir. 1964); *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979).

[4] *See also, United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919); *Lynch v. United States*, 292 U.S. 571 (1934). *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

II. THE SUPREME COURT SHOULD NOT ABANDON THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

Petitioner essentially argues for reversal of fifty years of Supreme Court precedent, beginning with *U.S. v. United States Fidelity & Guaranty, supra,* and continuing up to *Oklahoma Tax Commission v. Potawatomi Indian Tribe, supra.* Petitioners recognize that the Tribes have immunity from suit. *Petitioners' brief,* footnote 7. However, the Petitioners then attempt to convince this Court to disregard its holdings because the Petitioners do not believe the theory of sovereign immunity was based upon proper historical precedent. The Supreme Court should decline such an invitation. Once this Supreme Court has spoken on a subject, the Court should not lightly reverse its course, especially one that is so firmly established in its jurisprudence.

In Petitioners' perception *Santa Clara* was in error and unsupported by precedent or law. *See Petitioners' brief* at footnote 9, p. 8-9. Respondent believes that *Santa Clara* was not an aberration. *Santa Clara* was not based upon shoddy historical analysis by the Court. To the contrary, the Court has repeatedly affirmed the substance of *Santa Clara,* and its doctrines, as shown by the Court's recent reference to the doctrine:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. *Turner v. United States,* 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *Santa Clara Pueblo v. Martinez, supra,* 436 U.S., at 58, 98 S.Ct., at 1677. Congress has always been at liberty to dispense

> with such tribal immunity or to limit it . . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine . . . . Under these circumstances, we are not disposed to modify the long-established principal of tribal sovereign immunity.

Oklahoma Tax Commission v. Potowatomi Indian Tribe, ___ U.S. ___, 111 S.Ct. 905, 910 (1991). This immunity from suit is subject only to the plenary power of Congress. *Santa Clara*, 436 U.S. 58 (1978); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 173, (1977). As a plenary power, the solution to potential problems with sovereign immunity is to seek redress in Congress, not further review by this Court. *Potawatomi Indian Tribe*, 111 S. Ct., at 912.

Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

III. THIS CASE IS NOT APPROPRIATE FOR RESTRICTING THE SCOPE OF SOVEREIGN IMMUNITY.

Assuming arguendo, that the Petitioner is not seeking a complete abandonment of the sovereign immunity doctrine, the case below is not the proper one in which to carve out an exception for tribal activities involving non-members going beyond tribal jurisdiction. Petitioners have tried to classify the underlying case as one involving the rights of off-reservation non-Indians against an Indian Tribe. However, Petitioners' assertions are belied

by the fact that the Petitioners in this case are two individuals who voluntarily assumed positions on the Sac and Fox Industrial Development Commission (SFIDC), *Petitioners' brief* at 3. The SFIDC was created by the Sac and Fox Nation under Sac and Fox Law. Therefore, this case involves a dispute between a federally recognized Indian tribe and people who were acting in the capacity of officials of a tribally created business. The former commissioners are now asking that they be allowed to sue the Sac and Fox Nation for indemnification for whatever liability they, as commissioners of the tribally created board, may have accrued.

Whatever the facts relating to the demise of SFIDC, this case does not squarely present an opportunity to rule upon sovereign immunity as it relates to external actions of an Indian nation. A right to indemnification would necessarily involve the respective right of the Petitioners and under the laws, customs and traditions of the Sac and Fox Nation. As such, this case should not lead to the rethinking of the sovereign immunity doctrine as laid out by this Court and followed by the various circuit courts of appeals.

However, given the above, even as to external actions there is no conflict among the circuits. Federal courts have repeatedly held that Indian Nations cannot be sued for monetary damages in the face of sovereign immunity which has neither been explicitly waived by the Tribe nor abrogated by Congress. In *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) injunctive relief was denied for plainly external actions of the Tribe. The plaintiff there sought injunctive relief against the Narragansett Tribe for trespass upon his property, property in which

the Tribe had affirmatively relinquished all claim and title. The Court for the First Circuit spent little time in disposing of that case, holding:

> The Tribe's surrender of its right to sue for non-settlement lands neither says nor implies anything about surrender of its sovereign immunity from suit relating to its territorial or *extraterritorial* actions. Absent explicit congressional authorization to the contrary, the district court had no choice but to dismiss the present action for lack of jurisdiction. (emphasis added)

Maynard v. Narragansett Indian Tribe, 984 F.2d at 16. Other circuits are in accord, *Black Hills Institute v. Dept. of Justice*, 967 F.2d 1237, fn.5 (8th Cir. 1992); *In Re Greene v. Mt. Adams Furniture*, 980 F.2d 590 (9th Cir. 1992); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992).

The decision below, even at its worst possible interpretation, presents no conflict among the circuits. While no Supreme Court case has directly addressed this issue, this Court has held that a State cannot require a Tribe to waive its sovereign immunity in order to take official tribal action outside the Indian Country of the Tribe, *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 106 S.Ct. 2305 (1986).

Petitioners cited no federal jurisdictional statute conferring state court authority over the Sac and Fox Nation or waiving the Sac and Fox Nation's immunity from suit because there are none. Therefore, there was no state court subject matter jurisdiction in the underlying action pursuant to federal law. In similar circumstances, the Tenth Circuit held the Muscogee (Creek) Nation immune

from suit. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). Since in this case the Nation never granted any waiver as to the Nation itself, the Sac and Fox Nation is immune from suit by the Petitioners. *See also, Sac and Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425 (10th Cir. 1992), vacated and remanded on other grounds, ___ U.S. ___, 113 S.Ct. 1985 (1993), where the Tenth Circuit held that the Sac and Fox Nation was immune from any attempt by the Oklahoma Tax Commission to recover taxes which would be due on non-tribal member income and motor vehicles.

IV. THE DOCTRINES OF EXHAUSTION AND COMITY WERE PROPERLY FOLLOWED IN THE CASE BELOW.

This case also does not present a reason to rethink the Supreme Court law enunciated in *Iowa Mutual* and *National Farmers Union* which support the holding below that the Petitioners should have proceeded, if at all, in the tribal court. The Tenth Circuit's decision below is squarely in line with this Court's precedent, and other circuits' decisions, requiring parties to first proceed in tribal court where issues involve the Tribe and tribal law.

In this case, the Respondent was named in the state court action when several members of the Board of Commissioners of the Sac and Fox Industrial Development Commission sought indemnification from the Sac and Fox Nation. That proceeding, as noted in Part III above, was inextricably intertwined with the internal laws and regulations of the Sac and Fox Nation.

In *Iowa Mutual Ins. Co. v. LaPlante, supra,* the petitioner attempted to bring suit in federal court based on diversity jurisdiction. The *Iowa Mutual* Court, in refusing to allow the suit to proceed in federal court even where federal court jurisdiction was clearly present pursuant to the diversity statute, 28 U.S.C. § 1332, stated:

> Although petitioner alleges that federal jurisdiction in this case is based on diversity . . . rather than the existence of a federal question, the exhaustion rule . . . applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a "full opportunity to determine its own jurisdiction" . . . proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors" . . . At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Iowa Mutual at 480 U.S. 16-17; *See, also, National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985). The *Iowa Mutual* Court went on to state that Tribal authority over activities on reservation lands is an important part of tribal sovereignty.

The state court matter involved a tribal dispute. The Third Party Plaintiffs' suit involved their actions as members of the Board of Commissioners of the Sac and Fox Industrial Development Commission which is principally located on the Sac and Fox Reservation. The tribal courts

must be given the opportunity to deal with such a controversy. State Courts, no less than the Federal Courts, must stay their hand, even if they otherwise have jurisdiction, in favor of tribal resolution of matters involving tribal law and relations. *Williams v. Lee*, 358 U.S. 217 (1959).

Respondent does not believe that the Court should revisit the issue of sovereign immunity. The lower court properly found there was no valid and clear waiver of the Respondents' immunity, and Petitioner appears to concede that point. *Petitioners' brief* at p.5. Finally, the grant of a Writ of Certiorari is inappropriate as the case involves internal laws of an Indian Tribe and people appointed to a tribally created industrial board.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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